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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 486

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, VERNE SCOGGINS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18667

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, VERNE SCOGGINS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Public Utilities Commission of the State of California (hereinafter referred to as "Commission"), and R. E. Mittelstaedt, Justus F. Craemer, Kenneth Potter, Peter E. Mitchell and Verne Scoggins, as members of and constituting said Commission, respondents and appellees, for its statement in opposition to statement as to jurisdiction herein of Southern Pacific Company, petitioner and appellant (hereinafter referred to as "Southern Pacific"), and

in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of Facts

Southern Pacific is an intrastate and interstate common carrier of freight and passengers by railroad, motor vehicle and vessel.

The Commission is the duly constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies. (Sections 17, 19-23a of Article XII of the Constitution of California; the Public Utilities Act, Statutes 1915, Chapter 91, as amended; and the Public Utilities Code, Statutes 1951, Chapter 764, as amended.)

Southern Pacific on April 15, 1950, filed an application with the Commission requesting authority to discontinue the operation of one midday passenger train in each direction between San Francisco and Oakland Pier on the one hand and Sacramento on the other, and intermediate points. The trains are known as "The Statesman" (Train No. 246) running eastward and "The Governor" (Train No. 229) running westward. The trains connect with a ferry-boat service between San Francisco and Oakland Pier. These trains furnish service between the large San Francisco Bay Area and the State Capitol, operating entirely within the boundaries of the State of California.

A hearing on said application filed by Southern Pacific was held by the Commission on July 6, 1950 and the matter submitted. The Commission on September 27, 1950 reopened the application proceeding for further hearing, and upon its own motion also ordered an investigation into the adequacy of the Southern Pacific passenger train service between various sections of the State, and particularly be-

tween San Francisco and Sacramento, and points intermediate thereto. The order of investigation extended to passenger train service other than the aforementioned, but such other service is not involved in the present proceeding now before the Court. The authority of the Commission to institute such an investigation upon its own motion is derived from Sections 705 and 1702 of the Public Utilities Code. The Southern Pacific's application and the Commission's investigation were thereupon consolidated, and two public hearings were held on August 26, 1951 and September 20, 1951.

The Commission then made its opinion and issued its order by Decision No. 47161 dated May 13, 1952 (51 Cal. P. U. C. 711), and acting upon Southern Pacific's petition for rehearing issued Decision No. 47276, on June 17, 1952. The Commission orders required that Southern Pacific discontinue the two midday passenger trains in question "by the use of steam locomotive and standard railway passenger equipment and shall substitute in lieu thereof railway passenger service by modern, self-propelled railway passenger cars". Further, that two other trains of Southern Pacific ("The Senator" and "The El Dorado") be refurbished to a standard comparable to modern railway passenger equipment," and that Southern Pacific "make a study and prepare and submit to the Commission a plan for the establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service"; and "make a study and prepare and submit to the Commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities." These latter two matters merely require Southern Pacific to make studies, hence they were preliminary matters and not final orders of the Commission. Decision No. 47276, ruling upon Southern Pacific's petition for

rehearing, modified said Decision No. 47161, finding that public convenience and necessity require continuance of the midday trains and that "the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient."; that an improvement in service is required; that the Southern Pacific had not discharged its public duty in that it failed to provide improvements in service required, having the ability so to do, and the improvements required would not constitute an undue financial or other burden.

The statutory authority of the Commission conferred upon it by the state legislature is to be found in the Public Utilities Code, Sections 730, 761, 762, 763. These statutory provisions are as follows:

> "730. The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules, and practices to be charged, collected, and observed by all such common carriers.
>
> "761. Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed,

enforced, or employed. The Commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

"762. Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any apparatus, facilties, or other physical property of any ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.

"763. Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation

to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

The Commission's aforementioned decisions have been affirmed and upheld in their entirety by the Supreme Court of the State of California in the matter of *Southern Pacific Company* v. *Public Utilities Commission of the State of California, et al.* (S. F. No. 18667), 41 A. C. 362, 260 P. 2d 70, the decision which is now being appealed to this Honorable Court.

II. Statement of Issues on Appeal

Southern Pacific contends that the continued operation of the trains in question with self-propelled equipment will: (1) be an undue burden upon its interstate commerce, (2) a denial of due process of law, and (3) the California statutory procedure for judicial review of orders of the Commission is a violation of the Due Process clause.

The trains in question operate entirely in intrastate commerce and at no time has Southern Pacific contended that its intrastate operations as a whole are operating at a loss.

Does the Commission, therefore, have the power and authority to order the continued operation of these intrastate trains and further require the employment of self-propelled cars?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Petitioner has cited a number of decisions from other jurisdictions where a railroad was permitted to abandon service because such service was not compensatory. There is no question but that the Commission, lawfully, could have granted petitioner's request for abandonment but it was not required to do so. Furthermore, cases cited from other jurisdictions are certainly not controlling and are of little help because they, for the most part, are based upon dissimilar statutory provisions and, in any event, are not binding upon the Public Utilities Commission of this State or upon this Court. In the case of *San Diego, etc., Ferry Company* v. *Railroad Commission*, 210 Cal. 504, at page 511, the Supreme Court of California has pointed out that cases cited from other jurisdictions are of very little help in construing the powers of the Public Utilities Commission of this State under the broad and pervasive constitutional and statutory provisions applicable:

> "Cases cited from other states expounding theories of regulated monopoly or restricted competition under particular statutes are likewise not helpful in defining the powers of the respondent Commission and of this court under our law."

Appellant contends that it is being deprived of its property without due process in that it is being required by appellees to discontinue the operation of two steam passenger trains and to replace them with two pieces of modern, self-propelled equipment, the keystone of its objection being that there is no public need for either type of operation. Of course, it is elementary that a State may require the continuation of railroad service at a financial loss and that such requirement raises no issue under the Federal Con-

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stitution. (*Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 347, 352-353, 95 L. Ed. 1002, 1007, 1010.) The rule has been consistently followed by this Court in *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 277-280, 54 L. Ed. 472, 478-480; *Atlantic Coast Line R. Co.* v. *North Carolina*, 206 U. S. 1, 23-27, 51 L. Ed. 933, 943-945; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. Ed. 390, 396; and in many cases cited by Mr. Justice Frankfurter in his concurring opinion in the *Alabama Public Service Commission* case, *supra*, at pages 352-353 of the U. S. Report.

As appellees were and are concerned with the public interest and the system service as a whole in California, let us first consider, in the light of the system service, whether apellant will be "deprived" of any substantial "property" by compliance with appellees' order.

The appellant's equipment ordered to be replaced was found to be "old, outmoded and outdated"; that it had been relegated to the service when it became outmoded and uneconomical in the service where it was originally used. The cost of modern, self-propelled vehicles has been estimated at $150,000 for each car with approximately three cars being sufficient.

Monthly operating reports of revenues and expenses of appellant filed with appellees show system net railway operating income of $45,381,528 after allowance for taxes and rents for the year 1951. By supplanting the two steam trains with modern, self-propelled vehicles, found to be the cheapest practicable equipment, the annual operating loss of the two trains would be reduced to $19,000. Such a loss is so insubstantial, in view of appellants' net income, as to present no deprivation of property important enough for the consideration of this Court. No showing was made by appellant that by the small and insubstantial loss to be in-

curred in complying with the Commission's decision, Southern Pacific Company would be deprived of that protection for its investment which alone can be made the basis of a claim under the due process clause of the Fourteenth Amendment. Further, Southern Pacific has never at any time claimed that its intrastate operation in California is operating at a loss or confiscatory.

Next is the question of public need for the service. Appellant claims that there is none, despite the fact that the operation in question is between the State Capitol and one of the largest metropolitan areas in the second largest State in the Union, and operating through communities which have increased their population by 50% in the last ten years. This statement comes with exceedingly poor grace from a carrier which will not furnish modern or up-to-date passenger service between such terminals until compelled to do so by the Commission. By the process of degrading its service, it has rendered it so unattractive to the public to reach the point of driving it to other modes of transportation. Certainly it does not lie within the rules of law or equity to permit a public utility to profit by its own inattention to its duty.

Appellant further contends that the record shows no need for continuance of the operation of the service, since there is evidence of operation of other trains, service by bus and airplane and use of the highway by private transportation. It was for *appellees* to conclude whether or not, despite availability at times of other means of transportation, there existed a continuing need of public convenience and necessity for the service in question. The Commission found that there exists such a need, which is a matter peculiarly within its jurisdiction. The record contains sufficient evidence to amply support the findings of the Commission. Also the Commission may draw upon its experience and informed

judgment in arriving at its decision. For a regulatory body to do so does not constitute its basing its decision on matters outside of the record.

> *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 560-563, 89 L. Ed. 1171, 1181-1182; 24 Cal. (2d) 378, 150 P. 8d 196.

Also, a regulatory body is not required to blind itself to obvious facts in arriving at its decision, although it might be said that, to some extent, in so doing it goes outside the record.

> *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 529-531, 90 L. Ed. 821, 831-833.

This Court has held that regulation of intrastate railroad services is "primarily the concern of the state."

> *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates);
> *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service);
> *Alabama Pub. Serv. Com.* v. *Southern Ry. Co., supra.*

> "The problems raised by the discontinuance of trains 7 and 8 cannot be resolved alone by reference to appellee's loss of their operation but depend more upon the predominantly local factor of public need for the service rendered."
>
> *Chesapeake & Ohio R. Co.* v. *Public Service Com. of West Virginia*, 242 U. S. 603, 608, 61 L. Ed. 520, 523, 37 S. Ct. 234 (1917).

The Supreme Court of the State of California, a body necessarily familiar with local problems, reviewing the factual basis for the Commission's findings, stated:

> "This Court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the

commission on a subject so peculiarly within its jurisdiction and *justifiably based on the record before it.*" (Emphasis supplied.)

To carry the contention of appellant to its logical conclusion, this Commission should permit the abandonment of *all* of appellant's intrastate passenger service, save only that small portion of it which, the record shows, earns its out-of-pocket costs, and permit it to continue to skim the cream of its lucrative freight transportation, because there is other passenger transportation available in the State, and the public, having become so exasperated with appellant's service, has taken enthusiastically to the use of automobiles.

The Commission does not so construe its duty to the people of this great and growing State, nor will it permit a utility to enjoy privileges while evading its duties. Performance of duty cannot be avoided merely because it is attended by some insubstantial pecuniary loss.

Chesapeake & Ohio R. Co. v. *Public Service Com. of West Virginia*, 242 U. S. 603, 61 L. Ed. 520, and cases therein cited.

It must ever be kept in mind that a public utility is performing a function of the State (*Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819), and that a public utility exercises an extraordinary privilege and occupies a privileged position and is not free to pick and choose the part or portion of the service it desires to render. The fact that part of its operations may not be remunerative is not controlling in such case.

United Fuel Gas Co. v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. Ed. 390, 396.

IV. The Decisions Create No Burden on Interstate Commerce

It is difficult to conceive how the Commission's decisions herein or the decision of the California Supreme Court in any manner place a burden upon interstate commerce as Southern Pacific contends or that the National Transportation Policy is in any way contravened.

To briefly comment upon some of the authorities cited by Southern Pacific, in the case of *California* v. *Zook* (1949), 336 U. S. 725, 729, 93 L. Ed. 1005, the National Transportation Policy was not mentioned. The Court sought out the national policy, as expressed in the commerce clause, in determining that there was no conflict between a section of the Federal Motor Carrier Act and a California statute. The California statute was upheld on the ground of local interest notwithstanding that the statute was a direct regulation of interstate commerce regarding a matter on which Congress had spoken.

In *Southern Pacific Co.* v. *Arizona* (1945), 325 U. S. 761, 89 L. Ed. 1915, the Arizona Train Limit Law limited the number of cars in *interstate* freight and passenger trains, and hence was a direct regulation of interstate commerce. It was held void as to interstate commerce on the ground that varying maximums of cars required by different states, through which trains would pass, would invade a field where uniformity of regulation would be a national need if any such maximum was to be validly prescribed. The statute, though enacted as a safety measure, tended to increase the number of accidents and made it necessary for the railroads to break up trains into shorter ones before entering the state. The required changes increased the operating expenses of the two railroads operating interstate in Arizona by $1,000,000 a year. This effect is to be contrasted with an estimated reduction of appellant's annual operat-

ing expenses from $105,000 to $19,000 through substitution of self-propelled cars.

In the instant case, based upon ample evidence, the California Commission found:

> "That Southern Pacific Company has attempted to maintain the service with outmoded equipment which was relegated to the service when it became outmoded and uneconomical in the service where it was originally used. The record is quite clear that the company has made but a minimum attempt to modernize its equipment and has failed to bring its service up-to-date between those points. The only effort that has been made in rehabilitating this equipment has been the air-conditioning and painting of old, outmoded and outdated cars." (51 Cal. P. U. C. 711, 718)

In substance, the findings of the Commission are that the service is inadequate, uneconomical and inefficient. Further findings of similar tenor, though more explicit, are contained in Commission Decision No. 47276, denying Southern Pacific's petition for rehearing, and are set forth in appellees' Statement of Facts.

Obviously, the type of service to be rendered by one railroad between designated points in California is not a subject feasible of regulation by a rule uniform as to all the states.

In *Davis* v. *Farmers Co-operative Co.* (1923), 262 U. S. 312, 67 L. Ed. 996, the state statute voided by the Court was held to be a direct regulation of a matter of interstate commerce, because it compelled every foreign interstate carrier to submit to suit in the state as a condition of maintaining a soliciting agent within the state, notwithstanding that the suit did not arise out of business transacted within Minnesota or that the plaintiff was a non-resident. It was held therein that the condition unreasonably obstructed and unduly burdened interstate commerce. From the Court's opinion appellant quotes language beginning "This common

interest, etc." However, appellant omits the immediately preceding sentence, of vital importance to the quotation, which reads: "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost."

In *King* v. *United States* (1952), 344 U. S. 254, 97 L. Ed. Adv. p. 207, the Court held that the Interstate Commerce Commission, in prescribing intrastate freight rates for railroads under Section 13(4) of the Interstate Commerce Act empowering the Commission to prescribe intrastate rates to remove undue, unreasonable or unjust discrimination against interstate commerce, may give weight to deficits in passenger revenue. Appellees take no issue with the case.

Colorado v. *United States* (1926), 271 U. S. 153, 70 L. Ed. 878, upheld the power of the Interstate Commerce Commission to determine that public convenience and necessity permit abandonment in interstate commerce of a railroad branch line situated wholly within the state. The case now before the Court does not concern abandonment of any rail line, but rather intrastate train service.

Atlantic Coast Line R. Co. v. *Wharton* (1907), 207 U. S. 328, 52 L. Ed. 230; *Chicago, B. & O. R. R. Co.* v. *Railroad Comm. of Wisconsin* (1915), 237 U. S. 220, 59 L. Ed. 926; and *St. Louis & S. F. R. Co.* v. *Public Service Comm.* (1921), 254 U. S. 535, 65 L. Ed. 389, all are concerned with unreasonable state action directly regulating interstate commerce, i.e., requiring stops by interstate trains.

It is respectfully submitted that the enactment in 1940 by Congress of the declaration of the National Transportation Policy does not create anything new or novel as to the question whether this case places an undue burden on interstate commerce or furnish an element of substantiality to the Federal question. Going once again to the case of *Alabama Public Service Commission* v. *Southern Ry. Co.*,

341 U. S. 341, 345-346, 95 L. Ed. 1002, 1006-1007, this Court said in regard to the Interstate Commerce Act:

> "But it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. Minnesota Rate Cases *(Simpson* v. *Shepard)* 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA NS 1151, Ann Cas 1916A 18 (1913). And Congress has since provided:
>
> "That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 USC § 1 (17(a)).
>
> "This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States,* 325 U. S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts,* 308 U. S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The superseding of state authority will be declared only where there is no possible doubt as to the clear intent of Congress to supersede the state authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary in order to protect the national interests which it, can hardly be claimed, is so affected by the Commission decisions herein.

Palmer v. *Massachusetts,* 308 U. S. 79, 82-85, 84 L. Ed. 93, 96-99;
Yonkers v. *United States,* 320 U. S. 685, 690-691, 88 L. Ed. 400, 403-405;
North Carolina v. *United States,* 325 U. S. 507, 511, 89 L. Ed. 1760, 1765.

Also, any doubt that may exist as to the superseding of state jurisdiction must be resolved in favor of state authority.

Arkansas R. R. Commission v. *Chicago, Rock Island & Pac. R. R. Co.*, 274 U. S. 597, 603, 71 L. Ed. 1224, 1228.

As heretofore pointed out, in the absence of Federal occupation of the field, it is a fundamental rule that a state has the authority to regulate and even burden interstate commerce of a local nature, provided the state does not discriminate against such commerce.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. Ed. 993, 998;

So. Carolina State Hy. Dept. v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. Ed. 734, 741.

In the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186, 95 L. Ed. 190, 202, the Court well states the rule as follows:

"The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley* v. *Port Wardens* (U. S.) 12 How. 299, 13 L. Ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker* v. *Brown*, 317 U. S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state in-

terest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."

In the light of the foregoing authority, it is submitted that the decisions herein involved do not in any manner create a burden upon interstate commerce, much less discriminate against it.

V. No Deprivation of Due Process Because of Limitation of Scope of Review

Appellant contends that the California procedure for statutory review of orders of the Commission is a violation of the Due Process Clause. Since appellant has quoted the pertinent sections of the Public Utilities Code in its brief (Secs. 1756-1760), appellees will not burden the Court by their repetition.

Appellant relies heavily upon the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, 64 L. Ed. 908, 914, which contains strong dissenting opinions by Justices Brandeis, Holmes and Clarke. While it has never been expressly overruled, it has been eroded and devitalized by the Courts themselves, disinclined to try regulatory proceedings *de novo*, in the cases of *Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-582, 584, 84 L. Ed. 1368; *New York* v. *United States*, 331 U. S. 284, 334-336, 91 L. Ed. 1492, 1528-1530; and finally rejected by *Alabama Public Service Com.* v. *Southern Ry. Co.*, *supra*, in the following language:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is

now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

VI. Conclusion and Motion to Dismiss or Affirm

It is respectfully submitted that the questions presented in this appeal have been so definitely determined that no substantial Federal questions are presented by the appeal entitling Southern Pacific to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, respondents and appellees respectfully move that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of California affirming the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California, November 5th, 1953.

Respectfully submitted,

EVERETT C. MCKEAGE,
RODERICK B. CASSIDY,
HAROLD J. MCCARTHY,
MARY MORAN PAJALICH.